No. 17-532

In The
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF FOR NATURAL RESOURCES LAW PROFESSORS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are law professors who teach and write in the area of natural resources law. They file this brief to explain the development of the National Forest System in the United States. In particular, this brief provides a detailed analysis of the legislative history and circumstances surrounding the congressional acts and executive orders that led to the establishment of what is today the Bighorn National Forest.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), the U.S. Court of Appeals for the Tenth Circuit held that just twenty-two years after federal negotiators induced Crow leaders to cede the majority of their land base by solemnly promising that they would continue to possess "the right to hunt upon [such lands] as long as the game lasts," *Proceedings of the Great Peace Commission of 1867-1868*, at 86 (Vine Deloria Jr. & Raymond DeMallie eds., 1975) (hereinafter "*Great Peace Commission*"), this right disappeared.

[1] The parties have consented to the filing of amicus curiae briefs in this matter. No counsel for either party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.

Repsis, 73 F.3d at 994. Even though game remains plentiful in the ceded territory, according to the Tenth Circuit, when Congress passed an act admitting Wyoming to the Union "on an equal footing with the original States," it abrogated Crow hunting rights. *Id.* at 989. Alternatively, the *Repsis* court stated that the creation of the Big Horn Forest Reserve[2] eliminated those rights. *Id.* at 993.

Lower court decisions in this case found *Repsis* controlling, and prevented Petitioner Clayvin Herrera from raising treaty rights as a defense when Wyoming prosecuted him for killing elk in the Bighorn National Forest. But *Repsis* is no longer good law. As the Petitioner and other amici have explained, this Court held in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), that a state's admission to the Union does not impliedly abrogate Indian treaty rights. *Id.* at 207. And there is no language in Wyoming's admission act, or discussion in the legislative history of

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[2] When President Grover Cleveland first set aside this area in 1897, it was referred to as the Big Horn Forest Reserve. Proclamation No. 30, 29 Stat. 909 (1897). In 1907, Congress passed legislation renaming all forest reserves "national forests," and thus, the Big Horn Forest Reserve became the Big Horn National Forest. *See* Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1256, 1269. Finally, President Theodore Roosevelt changed the name of this area to Bighorn National Forest in 1908. Exec. Order No. 908 (1908). Where possible, this brief refers to the area using the name it held during the time being referenced.

that act, which could be read to abrogate Crow treaty rights.[3]

This brief addresses the alternative argument raised in *Repsis* and below: that the creation of the Big Horn Forest Reserve eliminated Crow treaty hunting rights, either by abrogating those rights or effecting an occupation of the land in question. This Court has repeatedly held that while Indian treaties can be unilaterally abrogated by the United States, only Congress possesses such power, and Congress "must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202. Express statutory language is preferred. *United States v. Dion*, 476 U.S. 734, 739 (1986) (noting that an "[e]xplicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights"). Where such language is absent there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the

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[3] Wyoming became a state in 1890. Act of July 10, 1890, ch. 664, 26 Stat. 222. A review of the legislative history of this Act establishes that Congress did not consider the abrogation of any Indian treaty rights when it admitted Wyoming to the Union. *See, e.g.*, H.R. Rep. No. 50-4053 (1889); S. Rep. No. 2695 (1889); 21 Cong. Rec. 2132-36, 2633-35, 2663-2712, 6468-94, 6515-32, 6570-89, 7034 (1890). Rather, the only references to Indian rights came during the discussion of an irrevocable commitment that Wyoming was required to adopt as a condition of statehood, providing that it would "forever disclaim" any rights to Indian lands. H.R. Rep. No. 39 at 4 (1890). This provision remains in the Wyoming Constitution. Wyo. Const. art. 21, § 26.

other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740. No such evidence exists here.

The Tenth Circuit in *Repsis* incorrectly claimed that "in 1887, Congress created the Big Horn National Forest." *Repsis*, 73 F.3d at 993. In actuality, however, it was President Grover Cleveland – not Congress – who designated the Big Horn Forest Reserve, and he did so by proclamation in 1897. Proclamation No. 30, 29 Stat. 909 (1897). The law enabling President Cleveland to take this action was known as the General Revision Act of 1891 (also known as the Forest Reserve Act or the Creative Act), ch. 561, 26 Stat. 1095. Section 24 of that Act, which authorized the President to "set apart and reserve" "public land bearing forests . . . as public reservations," was added to the bill for the first time during a conference committee to reconcile competing House and Senate bills.

There was no language in the General Revision Act that abrogated tribal treaty hunting or fishing rights. To the contrary, the Act contains *anti*-abrogation language, stating that "nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands." § 10, 26 Stat. at 1099. An exhaustive review of the legislative history of not only this bill, but its predecessors, confirms that Indian usufructuary rights were never discussed when Congress considered the creation of forest reserves. *See* Section I(A)&(B), *infra* (collecting and discussing the legislative history).

Confusingly, the Tenth Circuit in *Repsis* went on to claim that because the designation of the Big Horn

Forest Reserve ensured that the lands "were no longer available for settlement" its "creation . . . resulted in the 'occupation' of the land." *Repsis*, 73 F.3d at 993. Since the 1868 Treaty of Fort Laramie limits Crow hunting rights to the "unoccupied lands of the United States," Treaty with the Crows, May 7, 1868, art. IV, 15 Stat. 649, such rights supposedly no longer existed.[4] It makes little sense, however, to read the designation of a forest reserve—an act designed to *prevent settlement* of the land—as an act of "occupation." President Cleveland's Proclamation explicitly reserved this land "from entry or settlement" and concluded by noting: "Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation." Proclamation No. 30, 29 Stat. at 909, 910.

Congress reviewed President Cleveland's designation of the Big Horn Forest Reserve almost immediately. In an 1897 appropriation act, which is today more commonly referred to as the Forest Service Organic Act, Congress suspended the effectiveness of the President's Proclamation for nine months to give settlers one more opportunity to occupy this land. Act of June 4, 1897, ch. 2, 30 Stat. 11, 34. After that period of time had passed, the land was once again withdrawn from settlement when the Big Horn Forest Reserve

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[4] Indian treaties must be interpreted according to special canons of construction, one of which requires the court to determine how the provisions would have been understood by the tribal negotiators. *Mille Lacs*, 526 U.S. at 196; *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

was automatically reinstated on March 1, 1898. Throughout this legislative process, Congress did not mention Crow treaty rights, let alone expressly abrogate them. *See* Section I(A)&(B), *infra* (collecting and discussing the legislative history).

This was not an oversight. Congress did not discuss abrogation of Indian treaty hunting rights when debating the 1891 and 1897 acts because the reservation of timbered lands from the public domain was not viewed as inconsistent with such rights. The forest reservation system was designed to ensure a governmental source of wood products to fulfill future needs and to mitigate the severity of droughts and flooding in the West. These purposes were not at odds with Indian hunting and fishing rights. *See* Section II, *infra*.

In fact, forest reserves have always been multi-use areas, and one of their uses has been to provide the public with the opportunity to hunt and fish for game species found within their borders. Sportsmen played an important role in the conservation movement that led to the creation of the National Forest System for this very reason. Today, National Forests remain areas where the habitat of game species is protected, in part, so that hunting and fishing can continue. Given this history, it is impossible to conclude that the creation of Big Horn National Forest abrogated Crow treaty hunting rights.

ARGUMENT

I. CROW TREATY RIGHTS WERE NEITHER ABROGATED NOR EXTINGUISHED BY THE CREATION OF THE BIG HORN FOREST RESERVE.

In the 1851 Treaty of Fort Laramie, the United States formally recognized Crow territorial boundaries, which included approximately 38.5 million acres of land in portions of what are now the states of Montana, Wyoming, North Dakota and South Dakota. *Montana v. United States*, 450 U.S. 544, 547-48 (1981). In that same treaty, the United States explicitly acknowledged that the Crow retained "the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." Treaty of Fort Laramie with Sioux, Sept. 17, 1851, art. V, 11 Stat. 749.

Less than twenty years later, federal officials sought a new treaty with the Crow Tribe. During negotiations, the Crow were repeatedly promised that if they ceded the land federal officials requested, they would "still be free to hunt as [they] are now." *Great Peace Commission* at 88, 90. Indeed, the Commissioner of Indian Affairs himself—Nathaniel Taylor—assured tribal leaders that they would have "the right to hunt upon [their ceded lands] as long as the game lasts." *Id.* at 86.

These negotiations culminated in the 1868 Treaty of Fort Laramie. Treaty with the Crows, May 7, 1868, 15 Stat. 649. That treaty established a reservation for the Crow Tribe of roughly eight million acres in

southern Montana. *Montana*, 450 U.S. at 548. While the Crow agreed to make this reservation their "permanent home" and to cede the remainder of their lands, the treaty expressly provided that the Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, art. IV, 15 Stat. 649. The creation of the Big Horn Forest Reserve did not abrogate or otherwise extinguish this treaty right.

A. The Big Horn Forest Reserve Was Created by the President with Authorization from Congress.

In 1891, Congress passed a statute commonly referred to as the General Revision Act (also known as the Creative Act, or the Forest Reserve Act), ch. 561, 26 Stat. 1095. At the time of its passage, the main purpose of the bill was to revise a series of land laws that had resulted in widespread frauds. *See, e.g.*, 21 Cong. Rec. 2351-52 (1890). To that end, the bill, which was the culmination of at least a decade of debate in Congress, revised or repealed provisions of the Preemption Acts,[5]

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[5] *E.g.*, Act of Sept. 4, 1841, ch. 16, § 10, 5 Stat. 453. Broadly speaking, the Preemption Acts provided a settler with the preferential right to buy his claim on the public lands for a small fee. Paul W. Gates, *History of Public Land Law Development* 219-47 (1968).

the Desert Land Laws,[6] and the Timber Culture Act of 1873.[7] Gates, *supra*, at 247, 565-66, 642 (broadly discussing modifications to land laws in the 1891 Act).

The House and Senate passed different versions of the bill that became the General Revision Act, and therefore, in September 1891, the bills were sent to a conference committee composed of Senators Plum (Kansas), Walthall (Mississippi), and Pettigrew (South Dakota), as well as Representatives Payson (Illinois), Pickler (South Dakota), and Holman (Indiana). 21 Cong. Rec. 10094, 10150, 10760 (1890). It was in conference that a new provision was added[8] which would

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[6] *E.g.*, Act of Mar. 3, 1877, ch. 107, 19 Stat. 377. In the Desert Land Laws, Congress authorized individuals in dry regions to file plans for irrigating up to 640 acres of nontimbered, nonmineral land, and to enter such lands upon payment of a small fee. If the individual could offer proof within three years that he had reclaimed the land for irrigation, he could receive title to the lands. Gates, *supra*, at 401, 638-42; E. Louise Peffer, *The Closing of the Public Domain: Disposal and Reservation Policies 1900-50*, 14 (1972); *see also* Gifford Pinchot, *Breaking New Ground* 81-82 (1947) (describing creative fraud schemes).

[7] Act of Mar. 3, 1873, ch. 276, 17 Stat. 605. This Act allowed settlers to claim 160-acres of land if they agreed to plant 40 acres (later amended to 10 acres) in trees and cultivate them. Ten years after entry, settlers were required to submit final proof of their tree cultivation to receive title to the land. John Ise, *The United States Forest Policy* 43-45 (1920).

[8] There is no official record of the actions that occurred during conference committee. Many scholars have expressed the view that Secretary of the Interior John Noble intervened at the "eleventh hour" and requested the insertion of Section 24 in the General Revision Act during the conference committee, after explaining that President Harrison would veto the law if it failed to include such a provision. *See, e.g.*, Ise, *supra*, at 115 n.187 (1972);

become the basis of what is today our system of National Forests:

> Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of reservations and the limits thereof.

General Revision Act, § 24, 26 Stat. at 1103. The bill, with Section 24 included, was then unanimously agreed to by the conferees.

Following the conference committee's agreement, the bill was then presented to Congress. Just a few days before the close of the session, on February 28, 1891, the Senate agreed to the committee's changes, including the addition of Section 24 regarding the establishment of forest reserves. Senator Plumb of Kansas, who had control of the bill, insisted on its

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Harold K. Steen, *The U.S. Forest Service: A History* 26 n.13, 26-27 (1976); Pinchot, *supra*, at 85. But the doctoral dissertation of Herbert Kirkland uncovered additional archival sources showing that Secretary Noble was not aware that Section 24 had been included in the bill for more than two weeks after its passage. Herbert D. Kirkland, The American Forests, 1864-1898: A Trend Toward Conservation 175 (1971) (unpublished Ph.D. dissertation, University of Florida). The provision was probably introduced by Senator Holman from Indiana; Holman had introduced a prior bill with very similar language, and he was a member of the General Revision Act's conference committee in 1891.

speedy consideration. There was some resistance from Senator Call who stated, in response to the reading of Section 24, "I shall not willingly vote . . . to any proposition which prevents a single acre of the public domain from being set apart and reserved for homes for the people of the United States who shall live upon and cultivate them." But despite Call's objections, the conference report was agreed to by the Senate. 22 Cong. Rec. 3545-47, 3605 (1891).

The bill encountered greater opposition in the House, however. Representative Payson attempted to obtain unanimous consent to the conference report without printing the bill, but he was vigorously challenged on this point by Representative Dunnell of Minnesota. 22 Cong. Rec. 3613-16 (1891). Substantively, Representative McRae of Arkansas voiced his opposition to the addition of Section 24. McRae pointed out that "[t]here is no limitation upon this extraordinary power if the land be covered with timber," and he argued that no lands should be withdrawn if they "are fit for agricultural purposes and not required for military purposes." *Id.* at 3614. Representative Payson responded by noting that "the right of a private citizen to make a home upon the public domain ought as a matter of public policy to be subordinated to the larger and broader principle of conserving the general good." *Id.*

Ultimately, Payson was able to carry the measure safely through the discussion on February 28, 1891. He

reminded his fellow legislators that "[t]here has never been an hour during the last ten years when the principle [sic] propositions in this bill have not been the subject of active and earnest discussion in this House." 22 Cong. Rec. 3615 (1891). This was true even for Section 24, and Representative Holman pointed out "that the bill in regard to the withdrawal of forest land is exactly the same as the bill passed last session, after very careful consideration," but which had failed in the Senate. *Id.* at 3614.[9]

While Payson could not obtain unanimous consent to the bill's passage on February 28, the bill was considered again on Monday, March 2, 1891, after the bill and conference report were printed. *Id.* at 3616. It passed without further debate, and the President was thus authorized to "set apart and reserve" public lands as forest reservations. 22 Cong. Rec. 3658, 3685-86 (1891). Within two years, Presidents William Harrison and Grover Cleveland had set aside more than eighteen million acres of land as forest reserves.

By the fall of 1893, however, it had become apparent that the continued creation of forest reserves was ineffective to safeguard these lands unless Congress

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[9] Representative Holman was likely referring to a bill that he had introduced in 1888, titled "A bill to secure to actual settlers the public lands adapted to agriculture, to protect the forests on the public domain, and for other purposes." H.R. 7901, 50th Cong. (1888). At the time, Holman was chairman of the Public Lands Committee. According to Gifford Pinchot, the American Forestry Association presented this bill to Holman, and it was originally drafted by Dr. Fernow, then head of the Forestry Division. Pinchot, *supra*, at 84.

also passed legislation providing direction for their protection and management. Peffer, *supra*, at 16, 17 n.26. Thus, in 1896, a National Forest Commission was created and provided $25,000 in funding by Congress "to enable the Secretary of the Interior to meet the expenses of an investigation of a national forestry policy for the forested lands of the United States." Act of June 11, 1896, ch. 420, 29 Stat. 413, 432.

The Secretary of the Interior directed Professor Wolcott Gibbs, President of the National Academy of Sciences, to assemble such a commission. The Commission traveled throughout the West, touring existing forest reserves and investigating areas where new reserves might be designated. Message from the President of the United States Transmitting the Report of the Committee Appointed by the Academy of Sciences Upon the Inauguration of a Forest Policy for the Forested Lands of the United States, Senate, 55th Cong., 1st Sess. Doc. No. 105, at 7 (hereinafter "Commission Report"); Pinchot, *supra*, at 89-93. On February 1, 1897, Charles Sargent, Chairman of the National Forest Commission, sent a preliminary report to Gibbs. In that report, the Commission recommended the immediate establishment of thirteen new forest reserves, including the Big Horn Forest Reserve. Commission Report at 39-40; *see also* Pinchot, *supra*, at 105-09 (noting that the Commission unanimously voted to recommend the creation of these new reserves in October 1896, and that Pinchot drafted descriptions for each of these reserves which were included by Sargent in his recommendations).

The Commission's preliminary report was forwarded by Gibbs to the Secretary of the Interior. Commission Report at 39 (attaching letter from Wolcott Gibbs to Hon. David Francis, Secretary of the Interior (Feb. 1, 1897)). After reviewing the recommendations, Secretary Francis wrote President Cleveland on February 6, 1897 suggesting that he follow the report's recommendations and establish thirteen additional forest reservations totaling an area of more than twenty-one million acres, including the Big Horn Forest Reserve. He concluded his letter by "respectfully suggest[ing] that the one hundred and sixty-fifth anniversary (February 22, 1897) of the birth of the Father of our Country could be no more appropriately commemorated than by the promulgation by yourself of proclamations establishing these grand forest reservations." *Id.*

Acting on this suggestion, on February 22, 1897, President Cleveland proclaimed thirteen new forest reserves in the West. Known as "Washington's Birthday Reserves," they included the Big Horn Forest Reserve in Wyoming. Pinchot, *supra*, 107-08. In the Proclamation establishing the Big Horn Forest Reserve, the President noted simply that these "public lands in the State of Wyoming, within the limits hereinafter described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation." 29 Stat. at 909. In the operative section, the Proclamation states that the lands are "hereby reserved from entry or settlement and set apart as a Public Reservation." *Id.* It concludes: "Warning is hereby

expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation." *Id.* at 910.

Cleveland made these proclamations without laying any of the political groundwork. Douglas Brinkley, *The Wilderness Warrior: Theodore Roosevelt and the Crusade for America* 293 (2009) (noting that "[w]hat added to these [western] senators' fury was that President Cleveland had issued his order without consulting them in any way"). The furor of opposition to these forest reserves from western states was unprecedented, even while eastern states continued to support their withdrawal from the public domain. Ise, *supra*, at 133-36. In the yearly bill to fund governmental operations—what would become the Sundry Civil Appropriations Act of 1897, but is more commonly referred to today as the Forest Service Organic Act—a compromise was reached. Peffer, *supra*, at 17-18; Pinchot, *supra*, at 109-12.[10] The bill "suspended" "Washington's Birthday Reserves" for nine months. Act of June 4, 1897, ch. 2, 30 Stat. 11, 34. This suspension was a clever tactic to overcome western demands for totally eliminating the new forest reserves. During this nine-month period, settlers could enter land in these areas, cut timber, and perfect claims that would be recognized by the federal government. After the nine-month

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[10] The first compromise bill was vetoed by President Cleveland. Senator Richard Pettigrew from South Dakota was able to craft a new compromise that passed Congress and was signed into law by President McKinley in June 1897. Pinchot, *supra*, at 112-16; Ise, *supra*, at 130-42.

period expired, however, each of the thirteen forest reserves, including the Big Horn forest, was to revert by default to their prior status unless the President took additional action. *Id.* at 34. To that end, the Act reaffirmed the President's authority to proclaim forest reserves, and it granted the President new authority to modify and withdraw those designations. *Id.* at 35.

President McKinley succeeded Cleveland, and he did not withdraw the proclamation for the Big Horn Forest Reserve. Thus, in March 1898, the Big Horn reserve was reinstated, reverting to the same status as if it had never been "suspended." Since that time, the forest's boundaries have been adjusted on several occasions by different presidents. *See, e.g.*, Proclamation No. 14, 31 Stat. 1976 (1900) (President William McKinley enlarging Big Horn forest); Proclamation No. 21, 32 Stat. 2004 (1902) (President Theodore Roosevelt enlarging Big Horn forest); Proclamation No. 39, 33 Stat. 2384 (1904) (President Theodore Roosevelt enlarging and diminishing area of Big Horn forest). Each of these proclamations contains the same general language found in the original designation of the Big Horn Forest Reserve, noting that reserving the land would promote "the public good," and warning settlers not to make settlement upon the reserved lands.

B. Congress Did Not Abrogate Crow Treaty Rights When It Passed the 1891 General Revision Act or the 1897 Forest Service Organic Act.

While Congress can unilaterally abrogate Indian treaty rights, its intention to do so must be clear and plain, because "Indian treaty rights are too fundamental to be easily cast aside." *Dion*, 476 U.S. at 738-39. Not only do Indian treaties represent solemn obligations of the federal government, but they also confer property rights which, when abrogated, require the payment of just compensation. *United States v. Sioux Nation*, 448 U.S. 371, 408-09 (1980) (concluding that just compensation is due when Indian property rights are taken unless Congress has made a good faith effort to provide the property's full value). For these reasons, this Court has been extremely reluctant to find congressional abrogation of treaty rights absent explicit statutory language. *Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *see also Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968) (holding that statutes will not be read to abrogate Indian treaty rights in "a backhanded way"). If explicit language does not exist, abrogation will be found only if congressional intent can be determined from "clear and reliable evidence in the legislative history of a statute." *Dion*, 476 U.S. at 739. "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the

other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 739-40.

There is no such evidence here. The General Revision Act of 1891 actually disclaims any impact on Indian property rights. § 10, 26 Stat. at 1099 (stating "[t]hat nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes"). And not only is there nothing in the text of the Act that indicates an intent by Congress to abrogate Indian treaty rights, let alone the hunting rights of the Crow Tribe, but nothing in the legislative history of the Act does so, either. Tribal hunting and fishing rights are not specifically mentioned in any of the congressional debates. *See* 21 Cong. Rec. 1523, 2349-53, 5272, 10085-94, 10760 (1890); 22 Cong. Rec. 3545-47, 3605, 3613-16, 3658, 3685-86.

Congress did consider other Indian interests in the debates on the bill. For example, beyond the anti-abrogation language in Section 10, the Senate discussed the need to ensure that neither Indians nor whites deliberately set fire to timber on the public domain. 21 Cong. Rec. 10091 (1890). The Senate also discussed setting apart the Annette Islands as a reservation for the Metlakahtlan Indians. 21 Cong. Rec. 10092-93. Yet there was no discussion of hunting or fishing rights in general, or the Crow Tribe's treaty rights in particular. *Swim v. Bergland*, 696 F.2d 712,

717 (9th Cir. 1983) (rejecting any claim that the Forest Reserve Act "gave [the President] the power to extinguish Indian treaty rights in those [federal] lands").

The same is true for the 1897 Forest Service Organic Act. That Act, among other things, suspended the effectiveness of President Cleveland's designation of the Big Horn Forest Reserve for nine months; granted the president authority to modify and revoke forest reserves previously created; and provided for the reinstatement of the Big Horn forest back into the forest reserve system, where it remains today. 30 Stat. at 34-35. Nothing in the legislative history of that statute indicates that Congress considered tribal treaty rights to hunt, fish, and gather in forest reserves in general, or in the Big Horn Forest Reserve in particular. *E.g.*, 30 Cong. Rec. 899-902, 905, 908-25, 961-71, 1278-85 (1897).

These statutes—the 1891 General Revision Act and the 1897 Forest Service Organic Act—form the basis of the National Forest System and, for that reason, they have been studied extensively by natural resources scholars. Scholars have recounted the history of prior bills, as well as petitions and reports submitted to Congress beginning in the 1870s, which would have granted the President the authority to withdraw forested lands from the public domain. *See, e.g.*, Kirkland, *supra*, at 140-55; Joseph Arthur Miller, Congress and the Origins of Conservation: Natural Resource Policies, 1865-1900, at 201-46 (July 1973) (unpublished Ph.D. dissertation, University of Minnesota); James L. Huffman, *A History of Forest Policy in the United*

States, 8 Envtl. L. 239, 240-58 (1978); Ise, *supra* at 45, 110-14. None of the predecessor bills contained language that would have abrogated Indian treaty hunting, fishing and gathering rights. *See, e.g.*, Kirkland, *supra*. These same scholars have analyzed the official and private correspondence of the key legislative and executive branch officials involved in the passage of the 1891 and 1897 Acts. *E.g.*, *id.* at 170-87 (reviewing archival collections including Bernard Fernow's papers at the National Archives, Gifford Pinchot's papers at the Library of Congress, and George Bird Grinnell's papers at the University of North Carolina, Chapel Hill). While such sources are well outside the legislative history and cannot be used to provide clear and plain congressional intent, even they do not appear to contain *any* indication that any official considered Indian treaty hunting rights and believed that the Acts would abrogate such rights. *Id.*

Lastly, the President cannot abrogate Indian treaties; only Congress has this power. But regardless, there is no indication in any of the official documentation that discussed setting aside the Big Horn Forest Reserve that anyone considered hunting and fishing rights, let alone wanted to abrogate those rights. For example, the February 1, 1897 letter from Charles Sargent on behalf of the National Forest Commission, which requested the designation of thirteen new forest reserves—including the Big Horn Forest Reserve—contains no mention of the Crow Tribe's hunting rights in the area. *See* Commission Report at 39-44 (attaching letter). With respect to the Flat Head Forest Reserve,

however, Sargent does mention that the Blackfoot Indians use water from the Milk River, and that the designation of this area as a national forest will help protect this waterway. *Id.* at 40. For two other proposed forest reserves—the San Jacinto Forest Reserve and the Utah Forest Reserve—Sargent's letter notes that some of the land had already been set aside as Indian reservation lands, and such lands would either need to be carved out of the designation or purchased by the United States. *Id.* at 43. Thus, it appears that where tribal rights could be impacted by the designation of a forest reserve, those rights were mentioned in Sargent's correspondence. But since hunting was not inconsistent with the designation of the Big Horn Forest Reserve, Crow treaty rights were not discussed.

II. TREATY HUNTING RIGHTS DO NOT CONFLICT WITH NATIONAL FOREST MANAGEMENT.

In recent years, scholars have finally acknowledged the significant role that sportsmen played in the conservation movement which led to the creation of the National Forest System. *See generally* John F. Reiger, *American Sportsmen and the Origins of Conservation* (3d ed. 2001). Sportsmen pushed for the protection of these areas to ensure the vitality of game species as well as their continued access to such species. *Id.* at 106 (noting that sportsmen "saw forests not as a challenge to the American mission of progress, but as one of the essential settings for that important activity called sport," because "[w]oodlands were both the

home of their quarry and the aesthetic backdrop for that avocation that many considered more rewarding—in a noneconomic sense—than their vocation"); *see also id.* at 124 (noting that sportsmen led the push for creation of forest reserves because they "wanted the preservation of their game and sporting grounds for aesthetic and recreational reasons, but they knew that the best way to accomplish their purpose was to couch it in utilitarian terms"). Thus, it is not surprising that hunting and fishing by members of the public has never conflicted with the purposes for which national forests were created. They were created to ensure a steady supply of timber and to protect waterways. From their inception, national forests were areas to be *used* rather than simply *preserved*. Their multi-use mandate has always included wildlife management in general, and hunting and fishing activities in particular.

Treaty rights retained by Indian tribes are in accord with this multi-use mandate. Tribal members are simply using national forests to harvest available resources that they are legally entitled to use. In doing so, they must comply with tribal hunting and fishing regulations, which are designed to ensure that there are healthy, sustainable fish and game populations for future generations. In actuality, tribal members tend to take only a small percentage of the available large game animals. *See, e.g.*, Miles Falck, Great Lakes Indian Fish & Wildlife Commission, *Results of the 2016 Off-Reservation* Waawaashkeshi *(deer)*, Makwa *(bear) and* Omashkooz *(elk) Harvest in the 1836, 1837 and*

1842 Ceded Territories of Michigan, Minnesota and Wisconsin at 7 (May 2018), https://data.glifwc.org/archive.bio/Admin%20Report%2018-04.pdf (noting that in 2016, tribal members took just 1,470 deer across twenty-three Wisconsin counties while exercising their off-reservation hunting rights under 1837 and 1842 treaties). This Court has recognized that states may regulate tribal treaty rights if they can demonstrate it is necessary for the conservation of the species. *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968). No such conservation necessity exists here; elk populations in Bighorn National Forest are actually higher than the desired management goal.

A. Key Players in the Early National Forest Movement Acted to Preserve Access to Game Animals on Public Lands.

In the 1870s and 1880s, Americans were just beginning to face the fact that wildlife resources were exhaustible. By this time, most of the eastern United States was deforested. Meanwhile, in the Midwest and western United States, wasteful destruction of wildlife was bringing species to the brink of extinction.[11]

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[11] The passenger pigeon, for example, was once found in the billions; dense flocks passing overhead could cause darkness to descend on an area for several minutes. Yet by the late 1880s, it had already become scarce. Allan Eckert, *The Silent Sky: The Incredible Extinction of the Passenger Pigeon* (2000). Other species of birds were imperiled by the insatiable demand created for bird feathers used to create fashionable hats worn by women in the United States. *American Sportsmen*, *supra*, at 95. Large game species such as the bison, which had historically numbered in the

Without government intervention to ensure sustainable wildlife populations and to protect their habitat, hunting might have become an activity limited to the landed estates of the wealthy, as it was in England. *See, e.g.*, Thomas A. Lund, *British Wildlife Law Before the American Revolution: Lessons From the Past*, 74 Mich. L. Rev. 49, 60 (1980) (discussing the reasons why in England, "game became [the] exclusive provender for the rich").

Perhaps not coincidentally, it was during this same time period in the 1870s and 1880s that the first national sporting periodicals appeared: *American Sportsman, Forest and Stream, Field and Stream*, and *American Angler*. These periodicals provided an important vehicle for encouraging the government to protect forested areas necessary to preserve fish and game. John F. Reiger, *Wildlife, Conservation, and the First Forest Reserve*, in *Origins of the National Forests: A Centennial Symposium* 106 (1992) (hereinafter *Origins*). A look at just one of these publications—*Forest and Stream*—shows how influential hunting and fishing sportsmen were in the conservation movement in general, and the push for forest reserves in particular.

Charles Hallock, the editor of *Forest and Stream*, used a subtitle every week to announce that his paper

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millions, also seemed destined for extinction by the 1880s. *Id.* at 94-95.

was "Devoted to . . . Preservation of Forests." *American Sportsmen, supra,* at 111. He frequently ran editorials emphasizing the need to protect forests as habitat for the game animals therein. *Id.* For example, an 1882 editorial entitled "Spare the Trees," asked:

> [W]hat will [fish and game codes] avail if there is no cover for game nor water for fish? . . . The crop [from a well-managed forest] . . . breaks the fierceness of the winds and keeps the springs from drying up, and is a comfort to the eye. . . . Under its protecting arms live and breed the grouse, the quail and the hare, and in its shadowed rills swim the trout. If we would have these, we must keep the woods a-growing. No woods, no game; no woods, no water; and no water, no fish.

Id. at 105 (quoting "Spare the Trees," in *Forest and Stream*, Apr. 13, 1882).

George Grinnell was the author of this and many other editorials. He joined the staff of *Forest and Stream* in 1876, after having already founded the Audubon Society. Reiger, *Origins, supra*, at 107. In the 1880s, when he became friends with Theodore Roosevelt, he mentioned the need for a sportsmen society to advocate for larger game mammals in the same way that the Audubon Society was advocating for birds. Roosevelt agreed, and the Boone and Crockett Club was born. At first, the club's members were primarily New York capitalists with deep pockets, as Roosevelt realized that large sums of money would be necessary to effectively lobby Congress. Brinkley, *supra*, at

202-03. Over time, however, the club would include many of the most respected men in America, as well as many of the leading figures in forest conservation, such as Gifford Pinchot.[12] Reiger, *Origins*, *supra*, at 111. As John Reiger notes "the members of the Boone and Crockett Club were central to the establishment of the first forest reserves. And the goal of conserving wildlife, especially big game, proved to be at least as important an objective as watershed protection." *Id.* at 116.

It was the Boone and Crockett Club that worked to convince President Harrison to designate the first forest reserve established in 1891, the Yellowstone National Park Timberland Reserve, which "in essence," became "the birthplace for both the national parks and national forests." *American Sportsmen*, *supra*, at 165-66; Reiger, *Origins*, *supra*, at 116.[13] After this

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[12] Pinchot was a big-game hunter and an ardent angler. *American Sportsmen*, *supra*, at 70. In 1896, he travelled west with the National Forest Commission to view the forest reserves already proclaimed by Presidents Harrison and Cleveland and to recommend additional reserves, including the Big Horn Forest Reserve. In his book *Breaking New Ground*, Pinchot describes a multi-week trip he took to hunt and fish in forested areas in Montana (including what would become the Flathead Forest Reserve and the Lewis and Clark Forest Reserve) immediately prior to the Commission's formal trip. Pinchot, *supra*, at 97-100. On that trip, Pinchot describes hunting for bighorn ram, grizzly bears, and deer, as well as trout fishing. *Id.* at 98, 99, 101, 102; *see also id.* at 125, 128-29 (describing subsequent hunting trip to western forest reserves in the summer of 1897).

[13] Harrison may have been easy to convince since he himself "had a penchant for duck hunting that knew no bounds." *American Sportsmen*, *supra*, at 108; *see also id.* at 236-37

successful interaction, Grinnell remained in constant contact with President Harrison's Secretary of the Interior, John W. Noble, about Indian issues (of which Grinnell "was also a dedicated champion"), forest protection, and fish and game. *Origins* at 116.

Secretary Noble's 1891 Report to Congress demonstrates the influence of the Boone and Crockett Club on his thinking. He noted in that Report that in addition to preventing "the needless destruction of our great forest," forest reserves "will preserve the fauna, fish and flora of our country, and become resorts for the people seeking instruction and recreation." *Interior Annual Report* (1891), I: XV. Wildlife figured significantly in President Harrison's creation of many early forest reserves. For example, petitions for the White River Plateau, Pike's Peak, and Pecos Forest Reserves called attention to the wildlife resources found therein as justification for their withdrawal from the public domain. *See* James Muhn, *Early Administration of the Forest Reserve Act: Interior Department and General Land Office Policies, 1891-1897*, 261, *in Origins, supra* (citing correspondence found in Record Group 49 of the National Archives).

President Harrison proclaimed forest reserves totaling some thirteen million acres during his time in office. He was succeeded by Grover Cleveland who like Harrison, was an "eminent sportsm[a]n." *American*

(reprinting pictures of President Harrison hunting at the Bengies Ducking Club in March 1891, the same month that the General Revision Act was passed).

Sportsmen at 108. While serving as President, Cleveland's love of bird hunting and freshwater fishing were so well known that he received "an unrelenting cascade of rods, flies, sinkers, hooks and lines" as well as "guns, cartridges, belts, game baskets, duck decoys, and stool pigeons," all from members of the public. H. Paul Jeffers, *An Honest President: The Life and Presidencies of Grover Cleveland* 226-27 (2000). In 1906, long after he finished his second term as President, Cleveland wrote a book on the joys of hunting and fishing called *Fishing and Shooting Sketches*. *Id.* at 82; *see also American Sportsmen, supra*, at 64, 108, 229.

President Cleveland was succeeded by Theodore Roosevelt, whose love of hunting is well known. Roosevelt set aside a total of 148 million acres of forest lands. He was supported in his efforts by Gifford Pinchot, who counseled him to continue couching these designations as necessary for timber consumption and watershed protection. But in private letters to President Roosevelt, Pinchot was more candid, and explained that nothing should be done to arouse public opposition to the extension of the forest-reserve system, "which is the prime necessity for the preservation alike of forests, streams, *and game*." *American Sportsmen*, *supra*, at 71. (emphasis added).

All of the key federal officials involved in the early decisions to create forest reserves expressed their intention to have these lands used not only for timber production and watershed protection, but also as areas of wildlife habitat where hunting and fishing could occur for future generations. Presidents Benjamin

Harrison, Grover Cleveland, and Theodore Roosevelt were all avid sportsmen, and their personal love of hunting and fishing was no doubt a contributing factor in their decisions to designate millions of acres of national forest land, including Bighorn National Forest. *American Sportsmen* at 62 (listing Presidents Harrison, Cleveland, and Roosevelt among seventy-six names of key sportsmen who shaped the early conservation movement, including the development of the National Forest System).

B. National Forests Are Multi-Use Areas That Have Always Permitted Hunting and Fishing.

In its 1897 Report, the National Forest Commission noted that reserved lands "must be made to perform their part in the economy of the nation" and "be managed for the benefit of the people of the whole country." Commission Report at 22-23. Thus, from their very beginning, national forests were created as multi-use areas. *See* Forest Commission's Report at 35-36 (contrasting areas where "natural wonders should be preserved without further defacement," and where "mining is prohibited . . . [or] their scenic value will be seriously impaired," with forest reserves, which were to be used for timber production, mining, and other consumptive uses). Multiple-use management is the basis of the oft-repeated Forest Service motto, which is to "manage these preserves for the greatest good to the greatest number in the long run."

One of these uses has always been hunting and fishing. The Organic Act's language limited the purposes for which national forests could be *established* to the protection of the forest, securing favorable waterflows, and furnishing a supply of timber. *See United States v. New Mexico*, 438 U.S. 696, 707-08 (1978). But the Act did not limit the purposes for which forests could be *managed*. Early on, these areas were managed for their fish and game resources. The public was permitted to use those resources by hunting and fishing therein unless the President directed otherwise.

In a 1907 Act, for example, Congress explicitly acknowledged that National Forests were used for their game resources by appropriating money for "the protection of fish and game" and "to transport and care for fish and game supplied to stock the national forests or the waters therein." Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1256, 1269-70; *see also* Eric T. Freyfogle & Dale D. Goble, *Wildlife Law: A Primer* 223 (2009) ("By the 1920s, the Forest Service was affirmatively managing its lands for wildlife-related recreation, particularly hunting"). In the 1930's, the Forest Service began issuing hunting and fishing regulations that identified hunting seasons, adopted bag and creel limits, and established licensing fees. *E.g.*, Regulation G-20-A, 1 Fed. Reg. 1259, 1266 (Aug. 15, 1936). Indeed, hunting had become so commonplace in national forests that when it decreased during World War II, "there was a distinct increase in the numbers of big game," which was significant enough to cause conflicts with livestock that

was competing for the forage within national forests. Peffer, *supra*, at 283.

In 1960, Congress officially recognized the multi-use mandate of national forests through the Multiple-Use, Sustained-Yield Act ("MUSYA"), Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified at 16 U.S.C. §§ 528-31). That Act provides that national forests, including Big Horn National Forest, "shall be administered for outdoor recreation, range, timber, watershed, and *wildlife and fish purposes*." 16 U.S.C. § 528 (emphasis added). The House Report for MUSYA noted that there was no opposition to this bill because "[t]he administration of the national forests has long been under the policies of multiple use." H.R. Rep. No. 86-1551, at 2 (1960). Congress simply thought it should clarify this practice through the enactment of a single statute that named "all [of] the renewable surface resources for which the national forests are established and shall be administered." *Id.*

In hearings leading to the passage of MUSYA, commentators frequently noted the extensive use that members of the public made of national forests for hunting and fishing purposes. *National Forests—Multiple Use and Sustained Yield: Hearing on H.R. 10572 Before the Subcomm. on Forests of the H. Comm. on Agriculture*, 86th Cong. 13, 18, 20, 21, 28, 35, 63, 100, 104, 109, 113, 115, 129 (1960). Acting Secretary of the Interior E.L. Peterson confirmed in a letter supporting the bill that one of the very reasons national forests were established was because they yield "game, and other wildlife," and he reminded Congress that "[o]ne-third

of the Nation's big game is found within their boundaries." *Id.* at 5. Other commentators provided detailed figures for particular national forests. For example, one letter included in the hearing record indicated that in 1959, the Monongahela National Forest welcomed 344,600 people who used its streams and lakes to fish, while hunting drew another 179,170 visits. *Id.* at 116.

Recognizing that national forests were facing increased demands for hunting and fishing opportunities, in 1974 Congress passed a statute known as the Sikes Extension Act, Pub. L. No. 93-454, 88 Stat. 1369 (1974) (codified as amended at 16 U.S.C. §§ 670a *et seq.*). In that Act, Congress instructed the Forest Service to create comprehensive plans for wildlife management in cooperation with state agencies.[14] *Id.* at § 201(a), 88 Stat. at 1369. These plans were to be designed to "enhance wildlife, fish and game resources to the maximum extent practicable," thereby providing more opportunities for members of the public to engage in hunting and fishing activities within national forests. *Id.* at § 205(6), 88 Stat. at 1374.

Today, hunting continues to be permitted in national forests. Beginning in 1941, the Forest Service

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[14] The federal government has almost unlimited power to manage the lands it owns, and therefore could enact its own laws governing all aspects of hunting and fishing, leaving no role for state laws. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). But it has not done so. Hunting and fishing on federal lands must comply with state licensing requirements, game seasons, and bag limits unless, for example, they are conducted pursuant to federally protected treaty rights. Freyfogle & Goble, *supra*, 206-07.

decided that rather than continue to issue and enforce its own hunting and fishing regulations, it would enter into cooperative agreements with states providing that state law would generally govern the taking of game. Michael J. Bean & Melanie J. Rowland, *The Evolution of National Wildlife Law* 343 (3d ed. 1997). This federal-state partnership still remains in effect. *See* 36 C.F.R. § 261.8 (prohibiting hunting in National Forests only "to the extent Federal or State law is violated"). Hunting by tribal members exercising off-reservation treaty rights is commonplace. The U.S. Forest Service's Manual recognizes that many tribes have "off-reservation treaty rights," including "rights to hunt," on lands within the National Forest System. U.S. Forest Serv., U.S. Dep't of Agric., *Forest Service Manual* § 1563.8b(1) (2016). The Forest Service has reiterated its ongoing commitment to administering the lands under its control "in a manner that protects Indian tribes' rights and interests in the resources reserved under the treaty." *Id.* To that end, it has entered into various intergovernmental agreements with Indian tribes that possess such rights. *See, e.g.*, U.S. Forest Serv., U.S. Dep't of Agric., *Memorandum of Understanding Regarding Tribal-USDA-Forest Service Relations on National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842* (Mar. 2012), https://www.fs.fed.us/spf/tribalrelations/documents/agreements/mou_amd2012wAppendixes.pdf (discussing treaty-based hunting, fishing, and gathering rights of the Lake Superior Chippewa Indians on National Forest lands).

In Bighorn National Forest in particular, hunting is a popular activity.[16] Big game species are found at healthy, sustainable levels that have been growing. This is particularly true of elk, the species Clayvin Herrera was convicted of hunting.[16] The Wyoming Game and Fish Department ("WGFD") has consistently reported elk populations that exceed goals in most regions of the state, including in the regional herds around Bighorn.[17] In 2016, the combined trend-based population objectives for the Sheridan region fortification, North Bighorn, and South Bighorn elk herds had risen to approximately 7,800 elk.[18] The corresponding trend counts and populations for those herds in 2016, however, totaled 10,350 or 2,550 elk over the averaged population objectives.[19]

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[16] U.S. Forest Service (USFS), Big Game Hunting, https://www.fs.usda.gov/activity/bighorn/recreation/hunting (last visited Sept. 2, 2018).

[16] *See, e.g.*, USFS, *FY 2015 Monitoring and Evaluation Rep.: Bighorn National Forest* 59-63 (2016), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd497849.pdf.

[17] *See, e.g.*, WGFD, Wyoming 2017 Statewide Hunting Season Forecast, https://wgfd.wyo.gov/hunting/wyoming-hunting-forecast#elk (last visited Sept. 2, 2018); WGFD, *2016 Big Game Job Completion Reports*, https://wgfd.wyo.gov/Hunting/Job-Completion-Reports/2016-Big-Game-Job-Completion-Reports (last visited Sept. 2, 2018) (listing reports of 2016 state regional big game figures).

[18] WGFD, *2016 Big Game Job Completion Reports: Sheridan Complete Report* 145, 155, 175 (2016), https://wgfd.wyo.gov/WGFD/media/content/PDF/Hunting/JCRS/JCR_BGSHERCOMP_2016.pdf (totals combined).

[19] *Id.*

This robust elk population has resulted in increased hunting opportunities, bringing in substantial retail funding to the state.[20] WGFD plans to achieve its management system goals through more liberal/extended hunting seasons to continue to decrease the number of elk and bring them closer to population objectives in the interest of preservation of habitat and other species.[21] WGFD forecasts increased elk populations and hunter successes in the Sheridan region for the 2018 hunting season.[22]

In sum, the Tenth Circuit and courts below got this entirely wrong. National forest lands are unoccupied by people or governments by design, and if "occupied" at all, it is by fish and game, not settlers. That is what Congress intended when it passed the important legislation in 1891 that allowed the Executive Branch to create forest reserves. Further, by its explicit language in Section 10, Congress decreed that when the Executive created national forests on lands subject to treaty hunting rights, Indian rights to use those lands reserved in treaties and ratified agreements would be

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[20] Southwick Associates, *Economic Contributions of Big Game Hunting in Wyoming* 4, 8 (2017) (noting $224 million in related sales; "[e]lk is the most targeted species by resident and guided non-resident hunters").

[21] WGFD, Comprehensive Mgmt. Sys.: Ann. Rep. to U.S. Fish & Wildlife Serv. App. A-3 (2017), https://wgfd.wyo.gov/WGFD/media/content/PDF/About%20Us/Commission/WGFD_ANNUAL_REPORT_2017.pdf.

[22] WGFD, 2018 Season Setting Comm'n Notebooks Apr.: Elk Hunting Season Forecast 2, 6-7 (2018), https://wgfd.wyo.gov/about-us/game-and-fish-commission.

preserved, not repealed. The National Forest System was lobbied for and created by sportsmen, who wanted to ensure that hunting would not only be a pastime available to the landed elite, as it had become in Europe. Hunting has always been permitted in National Forests, and it is a common activity today. There is simply no conflict between Crow tribal treaty hunting rights and the purposes for which National Forests were created.

CONCLUSION

The judgment of the District Court of Wyoming, Sheridan County, should be reversed.

Respectfully submitted,

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